

Development Permit/ Environmental Determination Appeal Application

**FORM
DS-3031**

November 2017

1. Type of Appeal: ☒ Appeal of the Project
☐ Appeal of the Environmental Determination

2. **Appellant:** Please check one ☐ Applicant ☐ Officially recognized Planning Committee ☒ "Interested Person"
(Per M.C. Sec. 113.0103)

E-mail: rbates@unithere.org

Address:	City:	State:	Zip Code:	Telephone:
1904 Fifth Avenue	San Diego	CA	92101	619-309-6770

3. Project Name:
CALIFORNIA THEATRE - PROJECT NO. 657138

4. Project Information		
Permit/Environmental Determination & Permit/Document No.:	Date of Decision/Determination	City Project Manager:
SDP/SDP/NUP/TM No. 657138	2/11/21	James Alexander

approve for a Site Development Permit (SDP), Neighborhood Development Permit (NDP), Neighborhood Use Permit (NUP), and Tentative Map (TM) for the construction of a 41-story, 431-foot tall mixed-use development with 336 residential dwelling units (DU), 190 hotel guest rooms, and 3,686 square feet (SF) of commercial/retail space for a project known as California Theatre ("Project"),

☒ Factual Error
 ☒ New Information
☐ Conflict with other matters
 ☒ City-wide Significance (Process Four decisions only)
☒ Findings Not Supported

Description of Grounds for Appeal (Please relate your description to the allowable reasons for appeal as more fully described in [Chapter 11, Article 2, Division 5 of the San Diego Municipal Code](#). Attach additional sheets if necessary.)

6. **Appellant's Signature:** I certify under penalty of perjury that the foregoing, including all names and addresses, is true and correct.

Signature:

Date: 2/25/2021

Note: Faxed appeals are not accepted.

ATTACHMENT: GROUNDS FOR APPEAL

Rick Bates and Unite Here Local 30 (“**Local 30**”) (collectively “**Appellants**”) appeal the City of San Diego (“**City**”) Planning Commission’s (“**Commission**”) approval on February 11, 2021 of a proposed 41-story, mixed-use development including 336 residential dwelling units and a 190-room hotel known as the California Theatre (“**Project**”) located at 1122 Fourth Avenue in the Downtown Community Plan area.¹ (Recommendation Report,² PDF p. 1.) The Commission’s approval included the granting of a Site Development Permit, Neighborhood Development Permit, Neighborhood Use Permit, and Tentative Map (i.e., Permit No. SDP/SDP/NUP/TM No. 657138) (collectively “**Project Approvals**”). (Id. at PDF p. 1.)

In short, the Commission granted significant FAR bonuses and parking deviations entirely untethered to the evidence in the record and contrary to local law. Particularly troubling is the lack of affordable housing incorporated into the Project—merely seven on-site units are provided in exchange for nearly 330 market-rate units and a 190-room commercial hotel. This paltry number of affordable units is a reduction from the 22 affordable units once anticipated in 2017 when the Project was much smaller and included no hotel. The City has the discretion to reject the Project Approvals and request more for the City, which desperately needs affordable housing now more than ever.

Appellants are also concerned that incomes for workers in service industries like hotels, restaurants, and retail at projects like the California Theater are insufficient for service industry workers to afford to live in San Diego as the workers attempt to recover from inequities exacerbated by a global pandemic. Such workers are often forced into long commutes or overcrowded living quarters to afford housing near their jobs. Appellants want to ensure that all required findings for the Project – particularly those that concern housing – are supported by substantial evidence and that there is a sustainable future for residents and workers in the City, especially for those disproportionately impacted by the pandemic.

I. STANDING

Mr. Bates filled out a speaker card and testified before the Commission during the last Project hearing, works in Downtown San Diego, has a beneficial interest in the Project and its impacts, and therefore is an “interested party” under the San Diego Municipal Code (“**SDMC**” or “**Code**”) § 113.0103. Local 30 represents workers in the leisure/hospitality industry who have been hardest hit by the pandemic and who have a beneficial interest in the project and its impacts. Local 30 advocates for a level playing field in the hospitality industry to ensure all projects follow the relevant zoning laws and rules. Local 30 wants to be sure that affordable housing requirements are followed so its members can afford to live in the City. Moreover, between March and April of last year, approximately 88,100 leisure/hospitality workers in the San Diego-Carlsbad metropolitan statistical area lost their jobs, or 46 percent of the industry’s workforce in the area, with only 42,800 of those jobs having returned as of December 2020 according to the estimates.³

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¹ Please note that pages cited herein are either to the page’s stated pagination (referenced herein as “p. ##”) or the page’s location in the referenced PDF document (referenced herein as “PDF p. ##”).

² See City (2/4/21) Report No. PC-21-005 (“**Recommendation Report**”), https://www.sandiego.gov/sites/default/files/dsd_pc_21-005_california_theatre.pdf.

³ [https://www.labormarketinfo.edd.ca.gov/file/indhist/sand\\$hws.xlsx](https://www.labormarketinfo.edd.ca.gov/file/indhist/sand$hws.xlsx)

II. PROJECT BACKGROUND

For context, the Project was originally proposed by the former developer/applicant as a 40-story, mixed-use development including 282 residential units—22 of which were affordable on-site units—and included 99 two-bedroom and 57 three-bedroom units, and 325 parking spaces (“**Original Project**”).⁴ The Original Project had a Floor-Area-Ratio (“**FAR**”) of 15.6:1 with a 5.6 FAR bonus (i.e., FAR exceeding the base max of 10:1 FAR) via incorporation of affordable housing, LEED Silver certification, three-bedroom rooms, and a Eco Roof.⁵ The Original Project was subject to a Supplemental Environmental Impact Report (“**SEIR**”) for purposes of the California Environmental Quality Act (“**CEQA**”). (Recommendation Report, PDF pp. 3.) After the City’s approval in April 2017, Save Our Heritage Organization initiated litigation resulting in the Original Project permits being invalidated but keeping the SEIR in place. (Id.) Below is a summary of the Original Project (highlighted for your convenience).

Figure 1: Original Project Summary⁶

Site Area	25,103 SF																								
Base Minimum FAR	6.0																								
Base Maximum FAR	10.0																								
Maximum FAR with Amenity Bonuses	20.0																								
Maximum FAR with Affordable Housing Bonus	23.5																								
Proposed FAR	15.60																								
Above Grade Gross Floor Area	391,650 SF																								
FAR Bonuses Proposed	3.5 – 35% Affordable Units 1.0 – LEED Silver 1.0 – 10% 3-Bedroom Units 0.10 – Eco Roof																								
Density	489 DU per acre																								
Stories / Height	40 stories / 422 feet																								
Amount of Commercial Space	10,900 SF																								
Amount of Office Space	None																								
Housing Unit and Bedroom Count / Average Size	<table><thead><tr><th></th><th>#</th><th>Range</th><th>Average</th></tr></thead><tbody><tr><td>Total Number of Housing Units</td><td>282</td><td></td><td></td></tr><tr><td>Studio</td><td>None</td><td></td><td></td></tr><tr><td>1 Bedroom</td><td>126</td><td>731 SF to 798 SF</td><td>769 SF</td></tr><tr><td>2 Bedroom</td><td>99</td><td>1,056 SF to 1,844 SF</td><td>1,170 SF</td></tr><tr><td>3 Bedroom</td><td>57</td><td>1,187 SF to 2,053 SF</td><td>1,235 SF</td></tr></tbody></table>		#	Range	Average	Total Number of Housing Units	282			Studio	None			1 Bedroom	126	731 SF to 798 SF	769 SF	2 Bedroom	99	1,056 SF to 1,844 SF	1,170 SF	3 Bedroom	57	1,187 SF to 2,053 SF	1,235 SF
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Number of Units to be Demolished	N/A																								
Number of Buildings over 45 Years Old	1 (California Theatre Building)																								
Inclusionary Affordable Housing Compliance	Inclusionary Affordable Housing will be provided on-site with 22 affordable units.																								
Automobile Parking																									
Market-Rate Residential (Required / Proposed)	269 (1 per DU + 1 per 30 DU for guests) / 292 ¹																								
Affordable Residential (Required/Proposed)	15 (per formula of SDMC Table 142-05D) / 22																								
Retail (Required / Proposed)	None / None																								
Motorcycle Parking (Required / Proposed)	14 (1 per 20 DU) / 16																								
Bicycle Parking (Required / Proposed)	56 (1 per 5 DU) / 61																								
Common Indoor Space (Residential)																									
Required	500 SF																								
Proposed	3,120 SF																								
Common Outdoor Open Space (Residential)																									
Required	3,765 SF																								
Proposed	6,108 SF																								
Private Open Space (Balconies and Decks)																									
Required	50% of DU (with 40 SF minimum)																								
Proposed	100% of DU																								
Pet Open Space																									
Required	100 SF																								
Proposed	4,630 SF																								
Residential Storage	240 cubic feet per DU																								
Assessor's Parcel Nos.	533-521-04, -05, and -08																								
Sustainability	LEED Silver																								

1. Plus additional compact spaces for a total market-rate residential total of 303 spaces.

⁴ See also City (3/30/17) Report No. CSD-17-03, PDF pp. 9-10, 17, (receiving 3.5, 1.0, 1.0, and 0.1 FAR bonuses for affordable housing, LEED Silver, 3-bedroom units, and eco roof [respectively]), <https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/1122%204TH%20AVENUE%20STAFF%20REPORT.PDF.pdf?meetingId=1936&documentType=Agenda&itemId=94104&publishId=320583&isSection=false>.

⁵ Ibid.

⁶ Ibid., at PDF pp. 10-11.

Now, the subsequent developer/applicant is proposing the current Project with the 190-room hotel and more dwelling units but only seven affordable housing units, less two/three-bedroom units, less on-site parking, and requests eight deviations from the zoning Code/regulations—including zero off-street parking spaces for the 190-room hotel in lieu of the Code-required 57 spaces. (Id. at PDF pp. 4, 6). So too, the Project proposes 18.56 FAR with 8.56 FAR bonus via FAR payments, three bedrooms, and LEED Gold certification. (Id. at PDF pp. 5, 11). Below is a summary of the Project as approved by the Commission (highlighted for your convenience).

Figure 2: Current Proposed Project

Site Area	25,101 SF
Base Min. FAR	6.0
Base Max. FAR	10.0
Max. FAR w/Amenity Bonuses	20.0
Max. FAR w/Affordable Housing Bonus	30.0
No Deviations to Height or Setbacks	32.0
Proposed FAR	18.56
FAR Bonuses Proposed	4.56 – FAR Payment Program 2.0 – Three Bedroom Bonus 2.0 – Green Building Bonus
Total Above-Grade Gross Floor Area	562,309 SF (96,402 SF of existing historical resource shall be exempt for the purposes of calculating FAR)
Stories/Height	41 stories / 431 feet
Number of Dwelling Units	241
Number of Hotel Guest Rooms	190
Amount of Commercial Lease Space	3,686 SF
Housing Units Summary	Total 336 Studios 68 1 Bedroom 160 2 Bedroom 69 3 Bedroom 39
Number of Buildings over 45 Years Old	1 – California Theatre, HRB Site No. 1291 (constructed in 1927)
Inclusionary Affordable Housing Compliance	Payment of Inclusionary Housing Fee (\$12.73/SF) Estimated Payment: \$4,964,330 (\$14,775/DU)
Parking Spaces	(Required/Proposed)
Automobile Parking (Residential)	0 / 194 (0 spaces/DU)
Automobile Parking (Hotel)	57 / 0* (0.3 spaces/hotel room)
Motorcycle Parking (Residential)	20 / 21 (1 space/10 residential spaces provided)
Motorcycle Parking (Hotel)	3 / 0* (1 space/20 commercial spaces required)
Bicycle Parking (Residential)	68 / 139 (1 space/5 DU)
Bicycle Parking (Hotel)	3 / 3 (1 space/20 commercial spaces required)
Common Indoor Space	Required: 500 SF Proposed: 4,798 SF
Common Outdoor Open Space	Required: 3,765 SF Proposed: 3,765 SF
Private Open Space (Balconies & Decks)	Required: 168 DU (50% of DU) Proposed: 99 DU (29% of DU)*
Pet Open Space	Required: 400 SF Proposed: 500 SF
Residential Storage Areas	Required: 240 cubic feet for 100% of DU (336 DU) Proposed: 240 cubic feet for 50% of DU 168 DU)*
Assessor's Parcel Nos.	533-521-04, -05, -08
Sustainability	LEED Gold certification

III. SPECIFIC ISSUES

In granting the Project Approvals, the Commission made several errors and/or abused its discretion.

First, the Commission failed to incorporate the seven affordable housing units required under the conditions of approval. Leading up to the Commission hearing, the applicant proposed to satisfy the City's Inclusionary Affordable Housing requirements (SDMC § 142.1301 *et seq.*) via payment of in-lieu fees. (See Fig. 2 above.) During the hearing, the applicant confirmed that it would meet its affordable housing obligation by including seven affordable housing units on-site (equivalent to two percent of the dwelling units). (Hearing Video,⁷ hh:mm:ss 01:09:20-01:09:30, 01:47:30-01:47:52.) This was new information not before disclosed to the public before the hearing. According to one Commissioner, which was echoed by others, the inclusion of the seven on-site affordable housing units was considered a "community benefit," justifying the granting of the Project Approvals. (Id. at hh:mm:ss 01:49:36-01:50:15.) However, Condition 17 of the Project Approvals states that the applicant can either pay the in-lieu fees or provide seven affordable housing units on-site. (Recommendation Report, PDF p. 35.) Nor do the approved plans indicated any information about the affordable housing units. (Id. at PDF p. 238.) Hence, the Commission erred by approving the staff recommended Project Approvals without instructing staff to amend the conditions to require the seven on-site affordable housing units. Furthermore, there are no details about the size, arrangement, or other information about the units to ensure the on-site requirement is enforced. This was an abuse of discretion to rely on illusory affordable housing units that may not come to fruition.

Second, even if they were to be included, only seven affordable housing units does not constitute public benefits justifying the FAR bonus. More affordable units are needed to qualify for the FAR bonus. As mentioned above, the Commission appeared to consider the seven affordable housing units as a "community benefit," justifying the 8.56 FAR bonus. (Hearing Video, hh:mm:ss 01:49:36-01:50:15). However, the Commission erred in conflating the City's Inclusionary Affordable Housing requirements with the City's FAR Bonus program (SDMC § 156.0309.1301 *et seq.*). Here, the City's Inclusionary Affordable Housing requirements and the City's FAR Bonus program are independent and cumulative to the other. So too, there is no evidence that two percent affordability requirement qualifies for a FAR Bonus under Code. (See SDMC § 156.0309, Tbl. 156-0309-A note (1) [referencing projects consistent with Tbls. 143.07(A) through (C), which in turn sets a minimum percentage of at least five percent].) Because the applicant has failed to demonstrate that seven affordable units satisfies the FAR Bonus program's requirements, it was contrary to the law for the Commission to consider these units to be a community/public benefit justifying the FAR Bonus.

Additionally, it is an abuse of discretion to suggest that the Project should be granted the FAR bonuses when compared to the Original Project. The Original Project requested less FAR bonus while providing more affordable housing units, more two- and three-bedroom units, and provided parking above Code requirements. Here, the applicant gets more market-rate condos, more FAR, and a brand new hotel. With less affordable housing. Moreover, nowhere in the record is it suggested that increasing the affordable housing units into the Project would be economically infeasible.

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⁷ YouTube (accessed 2/25/21) Planning Commission Meeting of February 11, 2021 ("Hearing Video"), <https://www.youtube.com/watch?v=0JwRHuBmCwc&feature=youtu.be>.

This lack of sufficient affordable units in the proposed Project runs counter to the City's need for more affordable housing. Admittedly, the City has consistently failed to produce the housing it plans—noting less than half of the 88,000 housing units planned between 2010-2020 was built as of December 2019. (Housing Element,⁸ PDF pp. 4.) The City's current Regional Housing Need Assessment (“RHNA”) obligation is 108,036 units. (Id. at PDF p. 8.) While some City leaders are hopeful that recent housing reforms will encourage more affordable housing projects,⁹ these opportunities are lost when projects are granted *discretionary* FAR bonuses without adequate, affordable housing incorporated. (See SDMC § 156.0309(e) [language is “may” exceed, which is inherently discretionary].) Moreover, by granting even more development rights for less affordable housing (as compared to the Original Project), the City is acting counter to the numerous goals and policies under applicable land use plans.¹⁰

Third, there is a lack of substantial evidence to justify a complete waiver of the hotel parking requirements. When asked by one Planning Commissioner whether the parking deviation was due to site restrictions and historical preservation measures or merely “market-driven”, the applicant failed to cite any historic measures that prevented the Code-required parking and stated that it was considered the “best choice” according to the hotel operator. (Hearing Video, hh:mm:ss 01:48:30-01:49:33.) This amounts to a claim that the hotel operator cannot maximize its profits, which does not constitute an undue hardship.¹¹ There is no evidence to show the Project with Code-compliant parking requirements is economically infeasible. The parking findings are not rational.

Fourth, the lack of affordable housing to justify the FAR Bonus and lack of hardship to justify the parking deviation conflicts with numerous Code-required findings for the Project Approvals, such as:

- The proposed development will not adversely affect the applicable land use plan;
- The proposed development will comply with the regulations of the Land Development Code including any allowable deviations pursuant to the Land Development Code;
- The deviation is the minimum necessary to afford relief and accommodate the development and all feasible measures to mitigate for the loss of any portion of the historical resource have been provided by the applicant;
- The denial of the proposed development would result in economic hardship to the owner. For purposes of this finding, “economic hardship” means there is no reasonable beneficial use of the property and it is not feasible to derive a reasonable economic return from the property;
- The development will materially assist in accomplishing the goal of providing affordable housing, in-fill projects, or sustainable building opportunities; and

⁸ https://www.sandiego.gov/sites/default/files/he_final_screen_view_0.pdf.

⁹ <https://timesofsandiego.com/business/2020/07/28/san-diego-falls-well-short-of-10-year-housing-goals-but-sees-promising-growth/>

¹⁰ See e.g., General Plan Land Use and Community Planning Element, PDF pp. 25, 33, 38-40, 51, https://www.sandiego.gov/sites/default/files/lu_2015.pdf; General Plan Housing Element, PDF pp. 72-80, https://www.sandiego.gov/sites/default/files/he_final_print_view_0.pdf; Downtown Community Plan, PDF pp. 50, 60, 62-66, <https://www.sandiego.gov/sites/default/files/downtown-community-plan-all-1.pdf>.

¹¹ See e.g., *Topanga Assn. for a Scenic Cmty. v. Cnty. of Los Angeles* (1974) 11 Cal.3d 506, 520; *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 926; *Broadway, Laguna, Vallejo Assn. v. Bd. of Permit Appeals* (1967) 66 Cal.2d 767, 775-776.

- Any proposed deviations are appropriate for the proposed location. (See SDMC §§ 126.0505, 126.0404, 126.0305.)

Code-required findings must be addressed in a non-perfunctory manner and supported by substantial evidence.¹² Here, this did not occur, and therefore the Commission's granting of the Project Approvals was an abuse of discretion.

IV. CONCLUSION

The issues discussed herein are adequate grounds for this appeal under SDMC § 112.0508(c). The lack of evidence justifying the paltry amount of affordable housing or the lack of hardship of providing all Code-required hotel parking directly affect the findings not being supported by substantial evidence. So too, the failure to encourage affordable housing here sets a dangerous precedent, that when replicated, would have a significant citywide impact on the City's affordable housing stock.

Appellants respectfully reserve the right to supplement this Appeal submission at hearings and proceedings for this Project.

¹² See e.g., *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 923; *Topanga Assn. v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.